TABLE OF AUTHORITIES

Case	Page
Arent v. Bray, 371 F.2d 571 (1967)	13
Bank of Grottoes v. Brown, 8 F.2d 321 (1925)	12
Barnes Coal Corp. v. Retail Coal Merchants Assoc., 4 Cir., 128 F.2d 645 (1942)	4
Carva Food Corp. v. Dawley, 202 Va. 543, 118 S.E. 2d 664 (1961)	5
Cover v. Critcher, 143 Va. 357, 130 S.E. 238 (1925)	6, 8, 10
Hospelhorn v. Corbin, 179 Va. 349, 19 S.E. 2d 72 (1942)	3
Lee's Adm'r v. Hill, 87 Va. 497, 12 S.E. 1052, 24 Am. St. Rep. 666	4
Mumpower v. City of Bristol, 94 Va. 737, 27 S.E. 581	6, 8
Pogue v. Retail Credit Co., 453 F.2d 336 (4th Cir. 1972)	2, 14
Richmond Re-Development and Housing Authority v. Laburnum Construction Corp., 195 Va. 827, 834, 80 S.E. 2d 574, 579 (1954)	7, 8

TABLE OF AUTHORITIES (cont.)

Case	Page
Travelers Insurance Co. v. Turner, 211 Va. 552, 178 S.E. 2d 503 (1971)	9
Vance v. Maytag Sales Corp., 159 Va. 373, 165 S.E. 393	6, 8
Watson v. Daniel, 165 Va. 564, 183 S.E. 183	4, 8
Westover Court Corp. v. Eley, 185 Va. 718, 40 S.E. 2d 177 (1946)	4, 6, 8
Winston v. Gordon, 115 Va. 899, 80 S.E. 756 (1914)	4, 5, 6, 8, 15

MISCELLANEOUS

Ann. 120 A.L.R. 1262 (Liability of Public Accountant)	15
1 Cyc. p. 49	5
1 Mich. Jur., Abatement, Survival and Revival, §30, page 29	6

STATUTES

Virginia Code Ann. §8-13 (1957 Repl.Vol.)	2, 13
Virginia Code Ann. §8-24 (1957 Repl.Vol.)	2, 13
Virginia Code 1950, §64-135	8

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-672

MARTI POGUE,

Petitioner,

vs.

RETAIL CREDIT COMPANY,

Respondent.

From the United States Court of Appeals for the Fourth Circuit

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PETITIONER'S BRIEF IN REPLY

MARTI POGUE, In Proper Person comes before the United States Supreme Court and says that the question of the Statute of Limitations as presented in Respondent's Brief in Opposition is not an issue before this Court because neither the Trial Court nor the Court of Appeals have ruled on this question.

However, as the question has been raised by Respondent, and because Petitioner also desires a ruling on this question, Petitioner, herewith files this her Brief in Reply.

MARTI POGUE, In Proper Person, pursuant to Federal Rule 24 (4) files this Petitioner's reply brief in the United States Supreme Court Case No. 72-672, *Marti Pogue v. Retail Credit Co.* and addresses herself to the question of the Statute of Limitations as was first raised by Respondent in its Brief In Opposition.

Respondent erred in stating that the statute involved in this case is §8-24 of the Code of Virginia and she respectfully maintains that §8-13 of the Code of Virginia is the governing statute in this case and directs the Court's attention to Statute §8-13 which provides:

> "Every action to recover money which is founded upon an award, *or on any contract,** other than a judgment or recognizance, shall be brought within the following number of years next after the right to bring same shall have first accrued, that is to say:
>
> If the case be upon any contract by writing under seal, whether made by a public officer, a fiduciary or private person within ten years;
>
> If it be made upon an award or upon a contract in writing signed by the party to be charged thereby, *or by his agent*, but not under seal, within five years; and

*Italics supplied by author unless otherwise noted.

If it be upon any other contract express or implied within three years unless it be an action by one partner against his co-partner for a settlement of the partnership account, or upon accounts concerning the trade of merchandise between merchant and merchant, their factors, or servants, in either of which cases the action may be brought until the expiration of five years from the cessation of the dealings in which they are interested together, but not after;

Provided that the right of action against the estate of any person hereafter dying, or upon such award of contract which shall have accrued at the time of his death, or the right to prove any such claim against his estate in any suit or proceeding, shall not in any case continue longer than five years from the qualification of his personal representative, or if the right of action shall not have accrued at the time of the decedent's death, it shall not continue longer than five years after the same shall have so accrued; and

Provided further that the limitation to an action or other proceeding for money on deposit with a bank or any person or corporation doing a bank business shall not begin to run until a request in writing be made hereafter, by check, order or otherwise." (Code 1919, §5810.)

That §8-13 is the correct statute is undisputable. As set forth in *Hospelhorn v. Corbin*, 179 Va. 349, 19 S.E.2d 72 (1942):

> "... The language used in the classification of contracts is all inclusive and *no obligation based on a contract*, whether written, verbal or implied is omitted."

Whether the five-year limitation statute applies as opposed to the one-year limitation statute depends on whether or not the action survives the death of the wrongdoes. Only these claims which survive to or against the personal representative if one of the original parties dies is covered by the five-year limitation statute. To clarify for the Court which claims survive, Petitioner quotes from *Winston v. Gordon*, 115 Va. 899, 80 S.E. 756 (1914) Supreme Court of Virginia:

> *"Actions of tort for wrongs to property, real or personal, or which grow out of breach of contract,* but not for wrongs done to the person or reputation or any purely personal wrong, survive."

See also *Westover Court v. Eley*, 185 Va. 718, 40 S.E. 2d 177 (1946); *Watson v. Daniel*, 165 Va. 564, 183 S.E. 183 and *Barnes Coal Corp v. Retail Coal Merchants Association et al;* 4 Cir., 128 F.2d 645 (1942).

This matter of survival was also dealt with in *Lee's Adm'r v. Hill*, 87 Va. 497, 12 S. E. 1052, 24 Am. St. Rep. 666. Here the court held:

> *"... Where this action is founded on contract, although nominally laid in tort, that action survives."*

> In a note to this case Id. at 672 it is said that 'action founded on contract where there is some wrong to the property rights, or interest, of another, survives the death of the wrongdoer.' "

In 1 Cyc., p. 49, the law upon the subject of survival is well summarized as follows:

> "At common law, as a general rule the qualities of assignability and survival are tests each of the other and are convertible terms. The question when an action survives depends upon the nature of the action and not upon the form of it. It has been held that the line of demarcation at common law, separating those actions which survive from those which do not, is that in the first the wrong complained of affects, primarily and principally, property and property rights, and the injuries to the person are merely incidental, while in the latter the injury complained of is to the person, and the property and rights of property affected are merely incidental . . ."

Petitioner respectfully says to this Court that every case cited in Respondent's Brief In Opposition was an action *ex delicto*, wherein damage was to the person as opposed to property, and with the Court's indulgence she will discuss each of the cases.

Carva Food Corp. v. Dawley, 202 Va. 543, 118 S. E. 2d 664 (1961). In this action the Supreme Court of Virginia applied the one year action limitation in a case involving negligence or constructive fraud. There the defendant was

an insurance agent who failed to write an endorsement to the plaintiff's insurance policy. A loss occurred which would have been covered but for the failure of the endorsement. The suit was based on negligence or constructive fraud, in that the insurance agent allegedly falsely or inadvertently represented that the policy covered the loss in question when in fact it did not. Petitioner maintains that *Carva v. Dawley* is a personal injury action, not a property action and therefore under the law of the State of Virginia would not survive the death of Dawley and quotes as follows:

> "... When Carva found itself unable to collect damages from Equitable, it sought to recover the same damages from Dawley.
>
> This is *not* an action to enforce the collection of damages to property under an insurance policy; but it is an action seeking to hold Dawley personally responsible for his failure to procure for Carva the policy requested by Carva. It was not instituted until four years and eleven months after the last insurance was issued ... 'A claim for indirect and accidental damage to plaintiff's estate arising from an injury, *merely personal* in its nature does not survive.'" See *Mumpower v. City of Bristol*, 94 Va. 737, 27 S. E. 581; *Winston v. Gordon*, 115 Va. 899. 80 S. E. 756; *Cover v. Critcher*, 143 Va. 357, 130 S. E. 238; *Vamce v. Maytag Sales Corp.*, 159 Va. 373, 165 S. E. 393; *Westover Court Corp. v. Eley*, 185 Va. 718, 40 S. E. 2d 177; 1 Mich. Jur., Abatement, Survival and Revival, §30, page 29.

Consequently, in that case the Supreme Court of Virginia, quite properly held that the one-year action limitation under §8-24 of the Code of Virginia applied.

Richmond Re-Development and Housing Authority v. Laburnum Construction Corp., 195 Va. 827, 834, 80 S. E. 2d 574, 579 (1954). This was an action by which plaintiff sought to recover damages done to one of its building as a result of a gas explosion alleged to have been caused by defective workmanship and materials furnished by defendant. The complaint in this action was sounded *in tort* and ". . . in deciding the applicable period of limitation the trial court held that the third amended declaration was an action *ex delicto* in three counts, that Count 1 charged breach of express warranties allegedly made after the work was completed, which induced the payment of the contract price claimed to be due; that Count 2 charged breach of an implied warranty of skill and workmanship; and that Count 3 charged fraud and deceit allegedly committed after the work was completed which allegedly induced payment of the contract price."

> ". . . The trial court held the action to be a personal action and that since there was no special statutory limitation covering the case it was controlled by §8-24, Code 1950.
>
> The trial court decided that as the cause of action alleged in Counts 1 and 3 of the final declaration were not such as would survive they were barred by the one-year limitation. *However*, the court held that Count 2 which charged a breach of an implied warranty of skill and workmanship, (i.e., the failure to perform a duty im-

posed by law was *quasi-tortious* [italics included] conduct directed at the property itself resulting in a weakened structure which ultimately caused the explosion), charged a direct injury resulting from this alleged lack of skillful performance, that this action survived, and thus the five-year statutory limitation was applicable."[1]

The court upon reaching its findings in *Richmond Re-Development and Housing Authority v. Laburnum Construction Corp.*, further stated:

"In considering whether the five-year or the one-year period of limitation in §8-24 is to be applied, we have frequently stated the determining principles. See *Mumpower v. City of Bristol*, 94 Va. 737, 27 S. E. 581, *Winston v. Gordon*, 115 Va. 899, 80 S. E. 756; *Cover v. Critcher*, 143 Va. 357, 130 S. E. 238; *Vance v. Maytag Sales Corp.*, 159 Va. 373, 165 S. E. 393; *Watson v. Daniel*, 165 Va. 564, 183 S. E. 183; *Westover Court Corp. v. Eley*, 185 Va. 718, 40 S. E. 2d 177. In treating the question of survival of actions consideration should be given to §64-135, Code 1950, which provides:

> '*For goods carried away, waste, or damage to estate of or by decedent.*—An action of trespass or trespass on the case may be maintained by or against a personal representative for the taking or carrying away any goods or

[1]The court held, however, that this count was barred by a limitation contained in the contract.

> for the waste or destruction of, or damage to, any estate of or by his decendent.' " (Code 1919, §5385.)

Special notice should be taken of the fact that §64-135, as stated above, applies only to §8-24 and *does not apply to §8-13 which governs contracts.*

Travelers Insurance Co. v. Turner, 211 Va. 552, 178 S. E. 2d 503 (1971). This was an action by insurers, as assignees of agent's customer, Harter, against agent for failure to effect automobile coverage as agreed between him and customer. The Supreme Court of Virginia held that customer could not assign his cause of action against agent for failing to effect automobile coverage as agreed to insurers in exchange for release of insurers' subrogation rights against customer arising out of automobile accident, as damage to customer did not occur when policy was not issued effecting coverage on date agreed upon, but rather at subsequent time because of negligence in operation of his automobile. In ruling in favor of Turner the Court said:

> "Assignability of right to recover damage depends upon whether original action is one which survives at common law, and tests of survivability and assignability of causes of action are the same . . . The damage to Harter did not occur when insurance policy was not issued effecting coverage on the date agreed upon. The damage occurred at a subsequent time because of an intervening event, Harter's negligence in the operation of his car, which might never have occurred. In these circumstances we held that the action

was a claim of a *personal* nature for indirect and consequential damages to Harter's estate and was not assignable.'"

Cover et al. v. Critcher, 130 S. E. 238 (1925). Here, at the solicitation of the defendant, plaintiffs and defendant entered into a contract whereby they were to purchase jointly some 3,000 acres of land, known as the Firmstone tract for $16,500. The defendant, under the contract, was entitled to the lumber and minerals on the land and title to the land when he had paid to the plaintiffs one-half the purchase price of the land, the plaintiffs retaining title until this amount was paid in full.

The Firmstone tract did not lie adjacent to the railroad, and plaintiffs contended that defendant represented to them that he owned, or had secured, rights of way across the lands between the Firmstone tract and the railroad. Whether or not this was true it transpired that defendant did not own the rights of way, and failed to secure them. Plaintiffs brought suit against defendant in which they charged Critcher with procuring the contract with the plaintiffs for the purchase of the Firmstone tract by fraudulent representation as to right of way and prayed for a recission of the contract. The suit was dismissed but "without prejudice to the said Cover to institute such other proceedings as he may be advised."

Nearly three years after entry of the decree Cover re-instituted his action wherein he charged that as a result of the alleged misrepresentation as to rights of way by the defendant, plaintiff claimed he was induced to purchase the Firmstone tract; that by reason thereof he lost 3,800 cords of chestnut oak bark, 10,000 cords of chestnut

wood, and was put to the expense of instituting proceedings to rescind the contract and enforce his lien.

A jury returned a verdict for the plaintiffs for $10,000, but the court set it aside and the Plaintiffs appealed.

The Court of Appeals said:

> "Whether the trial court was right in its conclusion, it is not necessary, in our opinion, to decide, and we express no opinion as to its action, because clearly, we think, the one-year statute of limitation applies in a case such as we have under review . . . The alleged misrepresentation as to rights of way did not operate to take away the goods of the plaintiffs, or cause waste or destruction, or inflict any damage upon, the estate of the plaintiffs. The damage is not direct, but if there was any injury, it was the consequential injury or loss to the estate which *flowed from a wrongful act to the person only.* The plaintiffs' use of the property and not the property itself was affected by the act of which he complains. The conduct of Critcher in failing to procure the rights of way, if proven to have been willful, only prevented Cover from using his property and exercising the right which he claimed to have, and *did not directly injure the property itself,* just as in the Mumpower case the alleged malicious conduct of the city of Bristol simply prevented Mumpower from using his property and did not injure the property."

Bank of Grottoes v. Brown, 8 F.2d 321 (1925). Brown, a citizen of New York rented a safe deposit box from the Bank of Grottoes in which he kept several thousand dollars worth of valuables. In June, 1921 burglars blew open the doors of the bank's vault. There were in the vault two sets of safe deposit boxes, differing in the way in which they were secured from unauthorized entry. The boxes themselves were all alike. Those boxes of one set, among which the renter's was included, were not otherwise secured than by a separate lock on each box. The boxes were put upon a shelf within the vault. Anyone who was within the vault could stretch out his hand and remove any one of them he chose. Most of this class of boxes were opened while in the vault or elsewhere and their contents extracted. The other set, as is usual in safe deposit boxes, were put into separate receptacles, each of which was itself secured by a steel door and lock.

Brown filed suit in Federal Court. His claim to recover against the bank was founded upon the allegation that it had failed to exercise ordinary care in guarding his valuables. Some 16 months elapsed after the burgulary before he brought suit and the bank pleaded a one-year period of limitation. The court, however held this a bad plea, treating as immaterial the fact that the declaration was so phrased as to sound in tort. The court held that the suit might as well have been brought in contract and such a right of action would have survived to an executor or administrator.

When a verdict was entered in favor of Brown, the Bank of Grottoes appealed. The Court of Appeals affirmed the decision of the lower court holding:

> "The learned court below correctly held that the suit was virtually *ex contractu* the right of action for which would have survived to an executor or administrator."

Petitioner includes *Bank of Grottoes v. Brown* in her Brief in Reply because as a breach of contract action it is similar to the one under discussion, and as such, serves to illustrate her point—namely, *that contract actions*, as provided for under §8-13 of the Code of Virginia, *survive and are not subject to the one-year limitation statute.*

Arent v. Brey, 371 F.2d 571 (1967). In this action buyer brought suit for damage for negligence or fraudulent inducement to purchase stock. The defendant moved to dismiss on the grounds that the cause of action was personal and abated the death of the plaintiff. The trial court held otherwise, and was sustained on appeal. The Court of Appeals said:

> "We think the District Judge was correct in holding that the cause of action survived since the injury complained of is one to plaintiff's property other than to his person or reputation. Thus under Va. Code §8-24 (1957), the five-year statute of limitation applies.

Petitioner presents *Arent v. Brey* to the court because it is also similar to the one at bar by virtue of the fact that in both instances the plaintiff either did rely or purportedly relied[2] on fraudulent representations of the defendant and as a result of that reliance suffered injury to *property.*

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[2]Case dismissed for failure to meet the requisite burden of proof.

MARTI POGUE V. RETAIL CREDIT CO,
453, F.2d 336 (1972.)

Petitioner's action against Retail Credit Co. is exactly what the pleadings say it is—a breach of contract on the part of Retail Credit Co. and she respectfully directs the court's attention to the pleadings filed in this case:

Count I

(Breach of Contract)

1. On or about July 25, 1967, Plaintiff's agent, George Hammerly contracted with defendant Retail Credit Co. that he would purchase and they would sell, one character and financial report on the Walker and Townsend Co., of 80 Wall St., New York, N.Y. based on a full investigation.

2. Said contract was made by her agent on behalf of Plaintiff, and consideration therefore was furnished by Plaintiff, an undisclosed principal. Plaintiff made monetary compensation to her agent. Agent made monetary compensation to the Defendant.

3. Defendant breached its contract in that it provided a false report and failed to make proper, full investigation.

By reason of the breach of contract, Plaintiff was damaged in the amount of $125,000.

That Count One is a breach of contract, *ex contractu* proceeding, is undisputable as evidenced by both the pleadings and the facts in the case, and therefore is provided for under §8-13 of the Code of Virginia.

Count II

(Constructive Fraud)

1. Plaintiff adopts Paragraph 1 and 2 of Count 1.
2. Defendant is a mercantile agency in the regular business of furnishing financial reports upon the request of their subscribers. As such, it has a duty to excercise care and diligence in their preparation.
3. Nothwithstanding said duty, defendant failed to exercise care and diligence, and furnished a report prepared with such gross negligence and with such bad faith as to amount to constructive fraud.

By reason of such gross negligence and constructive fraud, Plaintiff was damaged in the amount of $125,000 and $125,000 punitive damages.

Whether Count II herein stated be considered an act *ex contractu* or an action based on tort[3] is immaterial by virtue of the fact as set forth in *Winston v. Gordon*, 115 Va. 899, 80 S. E. 763 (1914):

> "*Actions* of tort for wrong to property, real or personal, or *which grow out of breach of contract . . . survive.*"

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[3]"Whether the action in such a case (failure to exercise skill and care) is for breach of contract or is based on tort has been a matter of discussion . . ." See. Ann. 120 A.L.R. 1262 (Liability of public accountant).

CONCLUSION

On the basis of the arguments presented in her Petition for Certiorari, together with arguments herein presented, Petitioner respectfully requests that the United States Supreme Court grant a Writ of Certiorari in favor of Marti Pogue and remand the case to the U.S. District Court with instructions to instruct the jury on the appropriate theories of relief.

Dated this 2nd day of January, 1973.

Respectfully submitted,

MARTI POGUE
In Proper Person
1240 N. E. 117th Terrace
Miami, Florida 33161

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Brief in Reply was mailed to the following addressee this 2nd day of January, 1973.

Adelard Brault, Brault, Lewis Geschickter & Palmer
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ADDENDUM

Section 8-13, Code of Virginia, 1950, as amended.

§8-13. Limitation of personal actions generally. — Every action to recover money which is founded upon an award, or on any contract, other than a judgment or recognizance, shall be brought within the following number of years next after the right to bring the same shall have first accrued, that is to say:

If the case be upon any contract by writing under seal, whether made by a public officer, a fiduciary or private person within ten years;

If it be upon an award or upon a contract in writing signed by the party to be charged thereby, or by his agent, but not under seal, within five years; and

If it be upon any other contract express or implied within three years, unless it be an action by one partner against his co-partner for a settlement of the partnership account, or upon accounts concerning the trade of merchandise between merchant and merchant, their factors, or servants, in either of which cases the action may be brought until the expiration of five years from the cessation of the dealings in which they are interested together, but not after;

Provided that the right of action against the estate of any person hereafter dying, or upon any such award or contract, which shall have accrued at the time of his death, or the right to prove any such claim against his estate in any suit or proceeding, shall not in any case continue longer than five years from the qualification of his personal representative or if the right of action shall not have

accrued at the time of the decedent's death, it shall not continue longer than five years after the same shall have so accrued; and

Provided further that the limitation to an action or other proceeding for money on deposit with a bank or any person or corporation doing a banking business shall not begin to run until a request in writing be made therefor, by check, order, or otherwise. (Code 1919, §5810.)

Section 8-24, Code of Virginia, 1950, as amended.

§8-24. Of actions not before specified. — Every action for personal injuries shall be brought within two years next after the right to bring the same shall have accrued. Every personal action, for which no limitation is otherwise prescribed, shall be brought within five years next after the right to bring the same shall have accrued, if it be for a matter of such nature that in case a party dies it can be brought by or against his representative; and, if it be for a matter not of such nature, shall be brought within one year next after the right to bring the same shall have accrued. The amendment extending the period within which an action for personal injuries may be brought under this section to two years shall not apply to any cause of action arising prior to July one, nineteen hundred fifty-four. (Code 1919, §5818; 1954, c. 589.)

Section 64-135, Code of Virginia 1950.

§64-135. For goods carried away, waste, or damage to estate of or by decedent. — An action of trespass or trespass on the case may be maintained by or against a personal representative for the taking or carrying away any goods or for the waste or destruction of, or damage to, any estate of or by his decedent. (Code, 1919, §5385.)